

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1029 (PCB SA 03-07) w/CS Public Records Exemption/Adverse Incident/Hospitals
SPONSOR(S): State Administration and Mack
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration</u>	<u>5 Y, 0 N</u>	<u>Williamson</u>	<u>Everhart</u>
2) <u>State Administration</u>	<u>5 Y, 0 N w/CS</u>	<u>Williamson</u>	<u>Everhart</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Open Government Sunset Review Act of 1995 in essence requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it is automatically repealed on October 2nd of the fifth year after enactment.

This bill reenacts the public records exemption for information contained in a 24-hour notification of an adverse incident or an injury to a patient provided to the Agency for Health Care Administration (AHCA).

Current law requires a hospital or surgical center to file with AHCA a notification that an adverse incident or an injury to a patient has occurred. The hospital or ambulatory surgical center's risk manager must file such notification no later than one business day after receiving a report that such incident has occurred.

This bill reenacts the public records exemption for information contained in such notification. It also allows such information to be used by the Department of Health in a disciplinary proceeding.

This bill does not appear to have a fiscal impact on state or local governments.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1029b.sa.doc
DATE: March 24, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Background

Current law requires each hospital and ambulatory surgical center to establish an internal risk management program that detects and responds to adverse incidents and injuries to patients. Adverse incidents are defined as “an event over which health care personnel could exercise control and which is associated in whole or in part with medical intervention, rather than the condition for which such intervention occurred,”¹ and which injures the patient. Examples of an adverse incident are as follows: death, brain or spinal damage, permanent disfigurement, or fracture or dislocation of bones or joints.

Facilities are required to submit:

- A notification of an adverse incident to AHCA no later than one business day (24-hour notification) after the risk manager has received a report of an adverse incident;
- A report within 15 days of the occurrence of an adverse incident; and
- An annual report to AHCA of adverse incidents.

If a facility does not file an annual report or a 15-day report, AHCA may impose an administrative fine, not to exceed \$5,000. There are no fines or penalties for failing to file a 24-hour notification.

Florida law provides a public records exemption for the information contained in a 24-hour notification of an adverse incident reported to AHCA by a hospital or ambulatory surgical center.² The public records exemption requires AHCA to keep such information confidential and exempt³ from public disclosure. In some instances, however, physicians being investigated pursuant to the filing of a 24-hour notification receive a copy of such notification attached to the physician’s letter of investigation. This appears to be a violation of the public records exemption.

The law providing the public records exemption also creates an evidentiary exclusion by providing that the information contained in a 24-hour notification of an adverse incident is not discoverable or

¹ Section 395.0197(5), F.S.

² Section 395.0198, F.S.

³ There is a difference between information and records that the Legislature has made *exempt* from public disclosure versus those that have been made *confidential and exempt*. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

admissible in a civil or administrative action, unless the action is a disciplinary proceeding brought by AHCA or the appropriate regulatory board. It also provides that such information may not be made available to the public as part of the record of investigation or prosecution in a disciplinary proceeding, which is made available by AHCA or the appropriate regulatory board.

Current law provides for future review and repeal of the public records exemption for information contained in a notification of an adverse incident. Pursuant to the Open Government Sunset Review Act of 1995 (Act), s. 395.0198, F.S., will repeal on October 2, 2003, unless otherwise reenacted by the Legislature. Pursuant to the Act, the Florida House of Representatives Committee on State Administration sent an Open Government Sunset Review Questionnaire to AHCA and held meetings with agency staff, as well as those affected by the exemption for information contained in a notification of an adverse incident.

AHCA stated such information contained in a 24-hour notification of an adverse incident is "preliminary, and serves the regulatory purpose of permitting the Agency early warning of events that may be potentially harmful to other patients. This permits earlier investigation and where warranted, intervention in situations of public concern."⁴ However, it does not appear that AHCA initiates an investigation of an adverse incident based solely upon the submission of a 24-hour notification of such incident, but waits for "more accurate" and more detailed information, which is submitted in the 15-day report of an adverse incident.

When asked what would happen if the public records exemption was not reenacted, AHCA stated "failure to reenact the public records exemption would significantly reduce reporting as well as the Agency's ability to quickly access areas of reported facility problems."⁵

Effect of Bill

As a result of the questionnaire response, this bill reenacts the public records exemption for information contained in the notification of an adverse incident provided to AHCA. This bill also allows such information to be used by the Department of Health in a disciplinary proceeding.

C. SECTION DIRECTORY:

Section 1. Amends s. 395.0198, F.S., removing the review and repeal language.

Section 2. Provides that the act shall take effect October 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.
2. Expenditures: None.

⁴ Open Government Sunset Review Questionnaire, July 17, 2002, question #12.

⁵ *Id.* at question #21.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not affect municipal or county government.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act of 1995

The Open Government Sunset Review Act of 1995⁶ provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

Section 119.15, F.S., also sets forth a Legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Art. 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement is not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Due to concerns raised regarding the repeal of the requirement to file a 24-hour notification, HB 1029 was recommitted to the Committee on State Administration on March 13, 2003, for further review. On March 24, 2003, the Committee on State Administration reheard the bill and adopted a strike-all amendment. Thus, HB 1029 was reported favorably with CS.

The original bill repealed the requirement for a hospital or surgical center to file with the Agency for Health Care Administration (AHCA) a notification within 24 hours that an adverse incident or an injury to a patient has occurred. Accordingly, the bill also repealed the public records exemption for the 24-hour notification of an adverse incident.

⁶ Section 119.15, F.S.

The bill with CS reinstates the requirement to file with AHCA a notification within 24 hours that such an incident has occurred. As a result, the bill with CS reenacts the public records exemption for such notification. It also allows the information to be used by the Department of Health in a disciplinary proceeding.